

## SETTLEMENT AGREEMENT

### I. PARTIES

This Settlement Agreement (Agreement) is entered into among the United States of America, acting through the United States Department of Justice and on behalf of the Office of Inspector General (OIG-HHS) of the Department of Health and Human Services (HHS) (collectively the United States); the State of California Department of the Attorney General, Bureau of Medi-Cal Fraud and Elder Abuse and the California Department of Health Services (collectively, California); and Beverly Enterprises, Inc. (Beverly), through their authorized representatives. The United States, California, and Beverly are hereafter collectively referred to as the Parties.

### II. PREAMBLE

As a preamble to this Agreement, the Parties agree to the following:

A. Beverly is a company incorporated in Delaware that provides health care services. MK Medical was a wholly owned subsidiary of Beverly from about October 1998 until August 2003.

B. Beverly and MK Medical submitted or caused to be submitted claims for payment to the Medicare Program (Medicare), Title XVIII of the Social Security Act, 42 U.S.C. §§ 1395-1395ggg, and the California Medical Assistance Program (Medi-Cal), under the authority of 42 U.S.C. §§ 1396-1396v, which is administered in the State of California by the California Department of Health Services.

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C. The United States contends that it has certain civil claims, as specified in Paragraph 3 below, against Beverly for submitting, or causing to be submitted, claims to Medicare and Medi-Cal for durable medical equipment and related items from approximately October 1, 1998 through August 31, 2002, when such claims were not supported by the required medical and/or claims documentation (hereinafter referred to as the Federal Covered Conduct).

D. The United States contends also that it has certain administrative claims against Beverly for engaging in the Federal Covered Conduct, as specified in Paragraph 4 below.

E. California contends that it has certain civil and administrative claims, as specified in Paragraphs 5 and 6 below, against Beverly for claims submitted or caused to be submitted for durable medical equipment and related items by the MK Medical facilities listed in Exhibit 1 from approximately October 1, 1998 through August 31, 2002, when such claims were not supported by the required medical and/or claims documentation (hereinafter referred to as the State Covered Conduct).

F. This Agreement is neither an admission of liability by Beverly nor a concession by the United States or California that their claims are not well founded.

G. Beverly has provided documents and information to the United States in response to the government's investigation of the Federal Covered Conduct. Beverly represents that such response has been truthful, accurate, and complete to the best of its knowledge and ability.

H. To avoid the delay, uncertainty, inconvenience, and expense of protracted litigation of these claims, the Parties reach a full and final settlement pursuant to the Terms and Conditions below.

### **III. TERMS AND CONDITIONS**

NOW, THEREFORE, in consideration of the mutual promises, covenants, and obligations set forth below, and for good and valuable consideration as stated herein, the Parties agree as follows:

1. Beverly agrees to pay the total amount of \$20,000,000 (the Settlement Amount) as follows:

(a) Beverly agrees to pay to the United States \$14,487,278 within ten (10) calendar days after the Effective Date of this Agreement, by electronic funds transfer pursuant to written instructions to be provided by the United States Attorney's Office for the Northern District of California.

(b) Beverly agrees to pay to California \$5,512,722 within ten (10) calendar days after the Effective Date of this Agreement, by electronic funds transfer pursuant to written instructions to be provided by the State of California.

2. Beverly fully and finally releases the United States and California and each of the United States' and California's agencies, officers, agents, employees, and contractors and their employees from any and all claims, causes of action, adjustments, and set-offs of any kind (including attorney's fees, costs, and expenses of every kind and however denominated) which Beverly has asserted, could have asserted, or may assert in the future against the United States, California, and the United States' and California's agencies, officers, agents, employees, and contractors and their employees related to the Federal Covered Conduct, the State Covered Conduct, and the United States' and California's investigation(s) and prosecution(s) thereof.

3. Subject to the exceptions in Paragraph 7 below, in consideration of the obligations of Beverly set forth in this Agreement, and conditioned upon Beverly's payment in full of the Settlement Amount, the United States (on behalf of itself, its officers, agents, and its agencies and departments referenced above in Paragraph 2) agrees to release Beverly and its predecessors, successors, assigns, and affiliates, and the officers, directors, and employees of same, from any civil or administrative monetary claim the United States has or may have under the False Claims Act, 31 U.S.C. §§ 3729-3733; the Civil Monetary Penalties Law, 42 U.S.C. § 1320a-7a; the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801-3812; or the common law theories of payment by mistake, unjust enrichment, and fraud, for the Federal Covered Conduct.

4. In consideration of the obligations of Beverly set forth in this Agreement, conditioned upon Beverly's full payment of the Settlement Amount, the OIG-HHS agrees to release and refrain from instituting, directing or maintaining any administrative action seeking exclusion from the Medicare, Medicaid, or other Federal health care programs (as defined in 42 U.S.C. § 1320a-7b(f)) against Beverly and its predecessors, successors, and assigns, under 42 U.S.C. § 1320a-7a (Civil Monetary Penalties Law), or 42 U.S.C. § 1320a-7(b)(7) (permissive exclusion for fraud, kickbacks, and other prohibited activities), for the Federal Covered Conduct, except as reserved in Paragraph 7, below, and as reserved in this Paragraph. The OIG-HHS expressly reserves all rights to comply with any statutory obligations to exclude Beverly from the Medicare, Medicaid, or other Federal health care program under 42 U.S.C. Section 1320a-7(a)(mandatory exclusion) based upon the Federal Covered Conduct. Nothing in this Paragraph precludes the OIG-HHS from taking action against entities or persons, or for conduct and practices, for which claims have been reserved in Paragraph 7, below.

5. Subject to the exceptions in Paragraph 7 below, in consideration of the obligations of Beverly set forth in this Agreement, and conditioned upon Beverly's payment in full of the Settlement Amount, California (on behalf of itself, its officers, agents, and its agencies and departments referenced above in Paragraph 2) agrees to release Beverly and its predecessors, successors, assigns, and affiliates, and the officers, directors, and employees of same, from any civil or administrative monetary claim California has or may have under the California False Claims Act, Cal. Gov. Code §§ 12650-12654, or the common law theories of payment by mistake, unjust enrichment, and fraud, for the State Covered Conduct.

6. In consideration of the obligations of Beverly set forth in this Agreement, conditioned upon Beverly's full payment of the Settlement Amount, California agrees to release and refrain from instituting, directing or maintaining any permissive administrative action seeking exclusion or suspension from the Medi-Cal Program against Beverly and its predecessors, successors, and assigns, under California Welfare and Institutions Code section 14123 (permissive suspension for violation of any statute, rule or regulation governing the Medi-Cal Program), for the State Covered Conduct, except as reserved in Paragraph 7, below, and as reserved in this Paragraph. California expressly reserves all rights to comply with any statutory obligations to exclude or suspend Beverly from the Medi-Cal Program under Welfare and Institutions Code section 14043.6 (revocation or suspension of license, certification or approval authority, or loss or surrender of license, certificate or approval while a disciplinary hearing is pending) or Welfare and Institutions Code section 14123 (conviction or automatic suspension upon notice from the Secretary of the U.S. Department of Health and Human Services) based upon the State Covered Conduct. Nothing in this Paragraph precludes California from taking action against entities or

persons, or for conduct and practices, for which claims have been reserved in Paragraph 7 below.

7. Notwithstanding any term of this Agreement, specifically reserved and excluded from the scope and terms of this Agreement as to any entity or person (including Beverly) are the following:

- (a) Any civil, criminal, or administrative liability arising under Title 26, U.S. Code (Internal Revenue Code);
- (b) Any criminal liability;
- (c) Except as explicitly stated in this Agreement, any administrative liability, including mandatory exclusion or suspension from Federal or State health care programs;
- (d) Any liability to the United States (or its agencies) for any conduct other than the Federal Covered Conduct or to California (or its agencies) for any conduct other than the State Covered Conduct;
- (e) Any liability based upon such obligations as are created by this Agreement;
- (f) Any liability for express or implied warranty claims or other claims for defective or deficient products or services, including quality of goods and services, provided by Beverly or MK Medical; and
- (g) Any liability for failure to deliver items or services due.

8. Beverly waives and shall not assert any defenses it may have to any criminal prosecution or administrative action relating to the Federal Covered Conduct or the State Covered Conduct, which defenses may be based in whole or in part on a contention that, under the Double Jeopardy Clause in the Fifth Amendment of the Constitution, or under the Excessive Fines Clause in the Eighth Amendment of the Constitution, this Agreement bars a remedy sought in such criminal prosecution or administrative action. Nothing in this Paragraph or any other provision of this Agreement constitutes an agreement by the United States concerning the

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characterization of the Settlement Amount for purposes of the Internal Revenue laws, Title 26 of the United States Code.

9. The Settlement Amount that Beverly must pay pursuant to Paragraph 1 of this Agreement shall not be decreased as a result of the denial of claims for payment now being withheld from payment by any Medicare carrier or intermediary or any State payer related to the Federal Covered Conduct or the State Covered Conduct; and Beverly shall not resubmit to any Medicare carrier or intermediary or any State payer any previously denied claims related to the Federal Covered Conduct or the State Covered Conduct, and shall not appeal any such denials of claims.

10. Beverly agrees as to the following:

a. Unallowable Costs Defined: that all costs (as defined in the Federal Acquisition Regulation (FAR), 48 C.F.R. § 31.205-47, and in Titles XVIII and XIX of the Social Security Act, 42 U.S.C. §§ 1395-1395ggg and 1396-1396v, and the regulations and official program directives promulgated thereunder) incurred by or on behalf of Beverly, its present or former officers, directors, employees, shareholders, agents, direct and indirect subsidiaries, brother or sister corporations, and divisions in connection with the following shall be “unallowable costs” on Government contracts and under the Medicare Program, Medicaid Program, TRICARE Program, Department of Veterans Affairs (VA) Health Program, and Federal Employees Health Benefits Program (FEHBP):

- (1) the matters covered by this Agreement;
- (2) the United States’ audit(s) and civil and any criminal investigation(s) of the matters covered by this Agreement;

- (3) Beverly's investigation, defense, and corrective actions undertaken in response to the United States' audit(s) and civil and any criminal investigation(s) in connection with the matters covered by this Agreement (including attorneys' fees);
- (4) the negotiation and performance of this Agreement; and
- (5) the payment made pursuant to this Agreement, including any costs and attorneys' fees.

b. Future Treatment of Unallowable Costs: These unallowable costs shall be separately estimated and accounted for in nonreimbursable cost centers by Beverly, and Beverly shall not charge such unallowable costs directly or indirectly to any contracts with the United States or any State Medicaid Program, or seek payment for such unallowable costs through any cost report, cost statement, information statement, or payment request submitted by Beverly, its present or former officers, directors, employees, shareholders, agents, direct and indirect subsidiaries, brother or sister corporations, or divisions to the Medicare, Medicaid, TRICARE, VA Health, or FEHBP Programs.

c. Treatment of Unallowable Costs Previously Submitted for Payment: Beverly further agrees that within 60 days of the Effective Date of this Agreement it shall identify to applicable Medicare and TRICARE fiscal intermediaries, carriers, and/or contractors, and Medicaid, VA and FEHBP fiscal agents, any unallowable costs (as defined in this Paragraph) included in payments previously sought from the United States, or any State Medicaid Program, including, but not limited to, payments sought in any cost reports, cost statements, information reports, or payment requests already submitted by Beverly, its present or former officers, directors, employees, shareholders, agents, direct and indirect subsidiaries, brother or sister corporations, or divisions and will request, and agree, that such cost reports, cost statements,



information reports or payment requests, even if already settled, be adjusted to account for the effect of the inclusion of the unallowable costs. Beverly agrees that the United States, at a minimum, shall be entitled to recoup from Beverly any overpayment plus applicable interest and penalties as a result of the inclusion of such unallowable costs on previously-submitted cost reports, information reports, cost statements, or requests for payment.

Any payments due after the adjustments have been made shall be paid to the United States pursuant to the direction of the Department of Justice, and/or the affected agencies. The United States reserves its rights to disagree with any calculations submitted by Beverly or any of its subsidiaries, divisions, affiliates, brother and sister corporations, predecessors, successors, or assigns, on the effect of inclusion of unallowable costs (as defined in this Paragraph) on the cost reports, cost statements, or information reports of Beverly, or any of its subsidiaries, divisions, affiliates, brother and sister corporations, predecessors, successors, or assigns.

d. Nothing in this Agreement shall constitute a waiver of the rights of the United States to audit, examine, or reexamine Beverly's books and records to determine that no unallowable costs have been claimed in accordance with the provisions of this Paragraph.

11. This Agreement is intended to be for the benefit of the Parties only. The Parties do not release any claims against any other person or entity, except to the extent provided for in Paragraph 12 below.

12. Beverly waives and shall not seek payment for any of the health care billings covered by this Agreement from any health care beneficiaries or their parents, sponsors, legally responsible individuals, or third party payors based upon the claims defined as the Federal Covered Conduct or the State Covered Conduct.

13. Beverly warrants that it has reviewed its financial situation and that it is currently solvent within the meaning of 11 U.S.C. §§ 547(b)(3) and 548(a)(1)(B)(ii)(I), and shall remain solvent following the payment of the Settlement Amount. Beverly warrants that it has or has access to sufficient assets to pay the Settlement Amount. Further, the Parties warrant that, in evaluating whether to execute this Agreement, the Parties (a) have intended that the mutual promises, covenants, and obligations set forth herein constitute a contemporaneous exchange for new value given to Beverly, within the meaning of 11 U.S.C. § 547(c)(1); and (b) conclude that these mutual promises, covenants, and obligations do, in fact, constitute such a contemporaneous exchange. Further, the Parties warrant that the mutual promises, covenants, and obligations set forth herein are intended and do, in fact, represent a reasonably equivalent exchange of value which is not intended to hinder, delay, or defraud any entity to which Beverly was or became indebted to, on or after the date of this transfer, all within the meaning of 11 U.S.C. § 548(a)(1).

14. Each Party to this Agreement will bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Agreement.

15. The Parties represent that this Agreement is freely and voluntarily entered into without any degree of duress or compulsion whatsoever.

16. This Agreement is governed by the laws of the United States. The Parties agree that the exclusive jurisdiction and venue for any dispute arising between and among the Parties under this Agreement will be the United States District Court for the Northern District of California.

17. This Agreement constitutes the complete agreement between the Parties. This Agreement may not be amended except by written consent of the Parties.

18. The individuals signing this Agreement on behalf of Beverly represent and warrant that they are authorized by Beverly to execute this Agreement. The United States and California signatories represent that they are signing this Agreement in their official capacities and that they are authorized to execute this Agreement.

19. This Agreement may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same agreement.

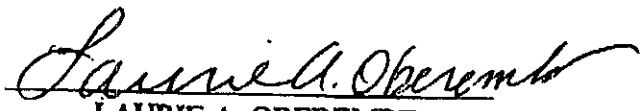
20. This Agreement is binding on Beverly's successors, transferees, heirs, and assigns.

21. The Effective Date of this Agreement shall be the date of signature of the last signatory to the Agreement. Facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Agreement.

**THE UNITED STATES OF AMERICA**

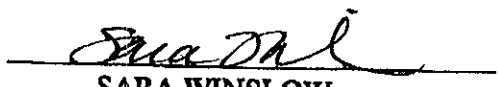
PETER D. KEISLER  
Assistant Attorney General

DATED: 8/17/06 BY:

  
LAURIE A. OBEREMBO  
Trial Attorney  
Commercial Litigation Branch, Civil Division  
U.S. Department of Justice

KEVIN V. RYAN  
United States Attorney

DATED: 8/18/06 BY:

  
SARA WINSLOW  
Assistant United States Attorney

DATED: \_\_\_\_\_

BY: \_\_\_\_\_

GREGORY E. DEMSKE  
Assistant Inspector General for Legal Affairs  
Office of Counsel to the Inspector General  
Office of Inspector General  
United States Department of  
Health and Human Services

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**THE UNITED STATES OF AMERICA**

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Assistant Attorney General

DATED: \_\_\_\_\_ BY: \_\_\_\_\_

LAURIE A. OBEREMBT  
Trial Attorney  
Commercial Litigation Branch, Civil Division  
U.S. Department of Justice

KEVIN V. RYAN  
United States Attorney

DATED: \_\_\_\_\_ BY: \_\_\_\_\_

SARA WINSLOW  
Assistant United States Attorney

DATED: 8/17/08

BY: \_\_\_\_\_

GREGORY E. DEMSKE  
Assistant Inspector General for Legal Affairs  
Office of Counsel to the Inspector General  
Office of Inspector General  
United States Department of  
Health and Human Services

**THE STATE OF CALIFORNIA**

STATE OF CALIFORNIA  
OFFICE OF THE ATTORNEY GENERAL  
MEDICAID FRAUD CONTROL UNIT

DATED: August 17, 2006

BY: S. B. Giorgi  
SUZANNE B. GIORGI  
Deputy Attorney General

STATE OF CALIFORNIA  
MEDICAID PROGRAM

DATED: \_\_\_\_\_

BY: \_\_\_\_\_  
THOMAS MCCAFFERY  
Chief Deputy Director  
California Department of Health Services

**BEVERLY ENTERPRISES, INC.**

DATED: \_\_\_\_\_ BY: \_\_\_\_\_

JULIANNE WILLIAMS-VINK  
President  
Beverly Enterprises, Inc.

McDERMOTT, WILL & EMERY LLP

DATED: \_\_\_\_\_

BY: \_\_\_\_\_  
RUSSELL HAYMAN, Esq.  
Attorney for Beverly Enterprises, Inc.

**THE STATE OF CALIFORNIA**

STATE OF CALIFORNIA  
OFFICE OF THE ATTORNEY GENERAL  
MEDICAID FRAUD CONTROL UNIT

DATED: \_\_\_\_\_


BY: \_\_\_\_\_

SUZANNE B. GIORGI  
Deputy Attorney General

STATE OF CALIFORNIA  
MEDICAID PROGRAM

DATED: 8/17/06

BY: \_\_\_\_\_

  
THOMAS MCCAFFERY  
Chief Deputy Director  
California Department of Health Services

**BEVERLY ENTERPRISES, INC.**

DATED: \_\_\_\_\_ BY: \_\_\_\_\_

JULIANNE WILLIAMS-VINK  
President  
Beverly Enterprises, Inc.

McDERMOTT, WILL & EMERY LLP

DATED: \_\_\_\_\_

BY: \_\_\_\_\_

RUSSELL HAYMAN, Esq.  
Attorney for Beverly Enterprises, Inc.

**THE STATE OF CALIFORNIA**

STATE OF CALIFORNIA  
OFFICE OF THE ATTORNEY GENERAL  
MEDICAID FRAUD CONTROL UNIT

DATED: \_\_\_\_\_

BY: \_\_\_\_\_  
SUZANNE B. GIORGI  
Deputy Attorney General

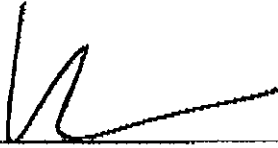
STATE OF CALIFORNIA  
MEDICAID PROGRAM

DATED: \_\_\_\_\_

BY: \_\_\_\_\_  
THOMAS MCCAFFERY  
Chief Deputy Director  
California Department of Health Services

**BEVERLY ENTERPRISES, INC.**

DATED: 8/18/06 BY: \_\_\_\_\_

  
JULIANNE WILLIAMS-VINK  
President  
Beverly Enterprises, Inc.

McDERMOTT, WILL & EMBRY LLP

DATED: 8/18/06

BY:   
RUSSELL HAYMAN, Esq.  
Attorney for Beverly Enterprises, Inc.



### **EXHIBIT 1**

<b><u>Provider No.</u></b>	<b><u>Name and Address</u></b>
1. DME00504F	HomeCare Preferred Choice, Inc., dba MK Medical, 429 E. March Lane, Suite D, Stockton
2. DME00504G	HomeCare Preferred Choice, Inc., dba MK Medical, 429 E. March Lane, Suite D, Stockton
3. DME01150F	HomeCare Preferred Choice, Inc., dba MK Medical, 13850 Cerritos Corporate Dr., Suite D, Cerritos
4. DME01150G	HomeCare Preferred Choice, Inc., dba MK Medical, 13850 Cerritos Corporate Dr., Suite D, Cerritos
5. DME01327F	HomeCare Preferred Choice, Inc., dba MK Medical, 8920 Activity Road, Suite A, San Diego
6. DME01327G	HomeCare Preferred Choice, Inc., dba MK Medical, 8920 Activity Road, Suite A, San Diego
7. DME01575F	HomeCare Preferred Choice, Inc., dba MK Medical, 2390 W. Cleveland Avenue, Suite 4, Madera
8. DME01575G	HomeCare Preferred Choice, Inc., dba MK Medical, 2390 W. Cleveland Avenue, Suite 4, Madera
9. DME01676F	MK Medical, 89 W. Montague Expressway, Milpitas
10. DME01989F	HomeCare Preferred Choice, Inc., dba MK Medical, 4800 White Lane, Suite L, Bakersfield
11. DME01989G	HomeCare Preferred Choice, Inc., dba MK Medical, 4800 White Lane, Suite L, Bakersfield
12. DME02256F	HomeCare Preferred Choice, Inc., dba MK Medical, 80 W. Olive Avenue, Merced
13. DME02256G	HomeCare Preferred Choice, Inc., dba MK Medical, 80 W. Olive Avenue, Merced

14. DME02372F HomeCare Preferred Choice, Inc., dba MK Medical, 3337 S. Fairway Street, Visalia (former address); 250 S. Burke Street, Visalia (new address)
15. DME02372G HomeCare Preferred Choice, Inc., dba MK Medical, 3337 S. Fairway Street, Visalia (former address); 250 S. Burke Street, Visalia (new address)
16. DME02881F HomeCare Preferred Choice, Inc., dba MK Medical, 4067 W. Shaw, Suite 116, Fresno
17. DME02914F HomeCare Preferred Choice, Inc., dba MK Medical, 3253 E. Shields Ave., Fresno
18. GXA000060 HomeCare Preferred Choice, Inc., dba MK Medical, 4555 North Cedar Avenue, Fresno